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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 579

TRIBORO SCOW CORPORATION, as owner of Scow TRIBORO NO. 12,

Petitioner,

vs

M. F. HICKEY CO., INC.,

Respondent,

and

GALLAGHER BROTHERS SAND & GRAVEL CORPORATION and Tug JOHN MURRAY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Dated: New York, N. Y.,
December 9th, 1960

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TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review so much of the judgment of the United States Court of Appeals for the Second Circuit entered on July 12th, 1960, in the action entitled TRIBORO SCOW CORPORATION, as owner of the TRIBORO No. 12, Libellant-Appellee v. M. F. HICKEY CO., INC., Respondent-Appellant, DOUGLAS JAMES,* Respond-

* Obtained discontinuance during trial (Appendix p. 28).

ent v. GALLAGHER BROTHERS SAND & GRAVEL CORPORATION and Tug JOHN MURRAY, Respondents-Impleaded-Appellees, as reverses the interlocutory decree entered in the United States District Court for the Eastern District of New York, in favor of petitioner against respondent, M. F. Hickey Co., Inc. and dismisses petitioner's libel.

Opinion of the Court Below

The opinion of the United States Court of Appeals for the Second Circuit (Circuit Judges: CHARLES E. CLARK, LEONARD P. MOORE and HENRY J. FRIENDLY) is reported at 280 F. (2d) 308 and is set out in the appendix of this petition (pp. 18-23). The judgment of the United States Court of Appeals also is set forth in the appendix to this petition (p. 24). Rehearing was denied without opinion and the Court's memorandum dated September 15th, 1960, is printed in the appendix to this petition (p. 26).

The opinion of the District Court is reported at 177 F. Supp. 636 and it, together with the findings of fact and conclusions of law of the Trial Court, is set out in the appendix to this petition (pp. 28-37).

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on July 10th, 1960. The petition for rehearing was denied September 15th, 1960.

The jurisdiction of this Court is invoked under Title 28, U.S.C. Section 1254(1).

The Question Presented

Does the Court of Appeals have power to reverse a decree in admiralty and dismiss a libel on a general reappraisal of the case and the issue of negligence as a conclusion of law and

1. without holding to be "clearly erroneous" any specific finding of fact of the trial court,

2. by resting its decision on testimony, the credibility of which the trial court justifiably rejected after its correction, repudiation and retraction by the witnesses who gave it and

3. by adopting and embracing testimony and arguments submitted in a brief by respondent Hickey, permission for the filing of which fourteen days after oral argument of the appeal, was granted after oral argument, and which brief says it is a "reply to the brief of Gallagher Brothers Sand & Gravel Corporation, the respondent-impleaded-appellee" whereas in fact it was respondent's main brief on appeal as to which petitioner had no opportunity to make answer.

Statute and Rules

The only Statute involved is the New York Personal Property Law, Sections 100 and 129 (printed herein at p. 45).

Also involved are: Rule 52(a) of the Federal Rules of Civil Procedure (printed herein at p. 47), Court of Appeals, Second Circuit, Rule 15(a) and Admiralty Rule 46½ (printed at p. 46).

Statement of Facts*

On January 25th, 1956, at 9:30 A. M., petitioner's wooden scow, TRIBORO No. 12, loaded with a cargo of sand and gravel consigned to the respondent, M. F. Hickey Co., Inc., holed her bottom on a sunken wreck, filled with water

* Numerals in parentheses refer to pages of the record submitted herewith unless otherwise indicated. The Court of Appeals opinion, the District Court opinion and findings of fact, printed in the appendix hereto, bear figures in parentheses conforming to pagination in the record filed herewith.

and capsized while lying at Hickey's East Mill Basin Terminal in New York Harbor. Petitioner instituted this action to recover damages from the consignee, M. F. Hickey Co., Inc., of approximately $33,000.00 resulting therefrom. Petitioner charged that Hickey breached its duty to care for the scow. The suit was tried in admiralty to a Judge without a jury, Honorable Leo F. Rayfiel. Six hundred and four pages of testimony were taken in four days of trial.

The Trial Court wrote a detailed, if not lengthy opinion (6) finding the respondent, M. F. Hickey Co., Inc., liable for the damage to the scow TRIBORO No. 12 and supplemented its opinion with 24 findings of fact and 6 conclusions of law (12).

The Trial Court found that respondent, M. F. Hickey Co., Inc., the consignee, signed a written receipt which expressly admitted delivery to it of the cargo on the TRIBORO No. 12 as of 7:00 A. M., January 25, 1956 (Finding 17, p. 14). Hickey's Superintendent, James G. Chambers, who signed the receipt, testified that the signing of this receipt was intended by him to operate as an acceptance of delivery of the cargo as of 7:00 A. M. (81, 82) and the Trial Court so held (Conclusion 1, p. 15).

The receipt read:

> "Time 7:00 A. M. January 25, 1956, received from Gallagher Bros. Sand & Gravel Corporation, 39 Broadway, New York, on scow Triboro 12 Arrived 1:30 A. M. at East Mill Basin for A-C-M. F. Hickey Co. cargo of ¾ gravel and sand • • • J. B. Chambers." (Ex. 4)

The Trial Court held:

Conclusion of Law #2:

> "After Hickey signed the receipt for the cargo on the TRIBORO 12 it was under a duty to use reasonable care to protect her from damage." (15)

Conclusion of Law #3:

"After Hickey signed the receipt for the cargo on the TRIBORO 12 it failed to exercise reasonable care to protect the TRIBORO 12 from damage." (15)

The Trial Court also found in Finding of Fact #21:

"At about 8:30 A. M. the TRIBORO 12 began to fill with water and list. Geddes, by the use of the crane, attempted to move the TRIBORO 12. He then attempted to unload her, but without success." (14)

In Finding of Fact #22:

"At about 9:30 A. M. the TRIBORO 12 capsized and sank by reason of the fact that her bottom had been pierced and penetrated by some underwater object as she lay moored to the stern of the McCORMACK 84." (14)

In Finding of Fact #23:

"Hickey's employees should have moved the TRIBORO 12 to a safe berth between 7:00 and 8:00 A. M. instead of permitting her to remain in a place which they knew was dangerous." (15)

In Finding of Fact #19:

"Geddes and Gilmartin, employees of Hickey saw the position of the TRIBORO 12 at 7:00 A. M. and knew she was in an unsafe place by reason of the shallowness of the water and the presence of a submerged wreck." (14)

In Finding of Fact #20:

"Hickey had at its yard a cargo crane which it used to move and unload scows; it was operated by Geddes."

In its opinion the Trial Court said (p. 10):

> "Hickey's employees knew at 7.00 A. M. that the 'No. 12' was in an unsafe place and that its position would become even more precarious with an ebbing tide. Yet, the receipt for the cargo on the 'No. 12' (Libelant's Exhibit 4) which Chambers signed at 7.00 A. M. on January 25, 1956 contained no statement to indicate that the scow was not in a proper place or that the cargo was delivered in other than good condition.
>
> . . . . .
>
> But, as aforestated, the receipt was unconditional. Having received the cargo, Hickey owed the libelant's scow the duty of reasonable care, particularly since, as Geddes and Gilmartin both testified, they knew she was in a bad berth, and Hickey could have moved her between 7.00 A. M. and 8.00 A. M. when, unquestionably, she was still afloat, and not in difficulty.
>
> . . . . .
>
> In my opinion, Hickey failed to use reasonable care in permitting the 'No. 12' to remain in the postion behind the 'McCormack 84'. It had adequate equipment at its plant to move scows back and forth along its bulkhead and it should have moved her between 7.00 and 8.00 A. M. instead of permitting her to remain in a place which its own employees knew was dangerous, a fact which was unknown to the captain of the 'No. 12'."

The facts found by the Trial Court were amply supported by admissions which were made clearly but reluctantly by respondent's witnesses, Chambers, Geddes and Gilmartin, after they had been confronted on cross examination with what they had said in signed statements immediately after the occurrence and which were at variance with what they had testified to on direct examination.

For example, Chambers, the Hickey Superintendent, testified (137, Trial Minutes, p. 347):

"Q. Now, you testified before—correct me if I am wrong—that you heard the boat, the TRIBORO 12, was listing at eight o'clock. Did you testify to that? A. I said approximately eight o'clock.

Q. Now, isn't that true that you said in this statement:

'At approximately 8:30 A. M., our laborer, Emilio Sannelli, notified me that the boat was listing badly and looked as though it would sink?'" (Record, pp. 349-350)

"Q. So that according to your statement it was eight-thirty or later that you called Gallagher Brothers?

Mr. McKernan: I object to the word 'later.'

The Court: He said immediately after in the statement.

Would you then say now that it was immediately after eight-thirty when your attention was called to it that you called Gallagher?

The Witness: I wouldn't say exactly.

The Court: You said immediately.

The Witness: I say in the statement, 'approximately eight-thirty.'

The Court: Shall we say that it was immediately after you were informed that it was listing, whatever time that was?

The Witness: Yes.

Q. Who did you call first? A. I called Gallagher first."

The Court of Appeals ignored this admission which was one of the bases of the District Court's decision.

Geddes, the crane operator testified (83):

"Q. At any time that morning after you came to work, did you endeavor to move the Hunts Point, the

McCormack, the Steers 71, with the Triboro No. 12 made fast to the McCormack 84, which was then behind to the south of the Hickey property? A. I tried to move it to the north."

And, again (p. 89):

"Q. What time was it that you tried to move the four scows? A. About eight-thirty.

Q. That was the first time that you tried to move the four scows, at eight-thirty? A. Eight-fifteen, eight-thirty."

Again the Court of Appeals ignored this admission on which the Trial Court rested finding 21 in part. That finding too was disregarded by the Court of Appeals.

Geddes, the crane operator, testified (11, Trial Minutes, p. 458):

"Q. You testified that you had never seen any vessel in the spot where—that is, sand scows in the spot where the Triboro 12 was on the morning of January 25, 1956, is that right? A. Correct.

Q. And you knew that was a bad berth for her, didn't you? A. Naturally.

Q. You know that here is not much water there? A. Yes.

Q. Everybody in Hickey knows that, don't they? A. I imagine everybody in the city knows that.

Q. Well, around Hickey, in the Hickey plant? A. That is right."

The Trial Court had expressly referred to these admissions when it said:

"The libellant contends that Hickey was negligent in permitting the 'No. 12' to remain in what is characterized as a foul berth after it had accepted the cargo. It points out that Geddes and Gilmartin, Hickey

employees, testified that they saw the position of the 'No. 12' at about 7:00 A. M. and knew that she was in a bad berth by reason of the shallowness of the water there, but that nothing was done about it until about 8:30 A. M. when she had already begun to fill with water and list." (9)

The Court of Appeals gave no explanation as to why these admissions and findings Nos. 19-21 based thereon should not be binding on it and the court made no reference to them.

Thus the Trial Court's critical findings that Hickey accepted delivery of the scow at 7:00 A. M. knowing she was in a dangerous berth and that Hickey did nothing to save or protect the scow until 8:30 A. M. when it was too late and she already was listing, were based on admissions of respondent's witnesses and do not allow for any dispute. These findings put the case on all fours with those in *New York Trap Rock Corp.* v. *Metropolitan No. 4*, 128 F. (2d) 831, wherein a loaded scow was delivered at an improper part of consignee's wharf and less than an hour later suffered damage. The Second Circuit Court of Appeals there said:

> "Having made a delivery which the consignee accepted * * * the risk of allowing the scow to remain where she was, fell upon the consignee."

In that case the only evidence of acceptance was oral, not in writing as here.

To like effect was *The Eastchester*, 20 F. (2d) 357 (C. A. 2).

The Court of Appeals herein did not hold to be clearly erroneous either of the two critical findings of the Trial Court, to wit:

> "Hickey had acknowledged receipt of the cargo as of 7:00 A. M. January 25, 1956." (Conclusion 1)

(The Court of Appeals said this issue need not be decided—126.)

and

> "At about 8:30 A. M. the Triboro 12 began to fill with water and list. Geddes by the use of the Crane attempted to move the Triboro 12 • • •." (Finding No. 21)

(This finding was ignored by the Court of Appeals.)

No direct attack was made on these or any other findings of the Trial Court by the respondent Hickey in its main brief in the Court of Appeals. However, 14 days after the May 10, 1960 oral argument of the appeal, the respondent with leave of the Court of Appeals filed a so-called reply brief, a copy of which will be found in the appendix hereto pages 38-44. (Rule 15(a) of the Court of Appeals requires reply briefs to be filed one day before oral argument.) The "reply" brief expressly states it is filed after oral argument and says "Respondent-Appellant, M. F. Hickey Co., Inc., makes this brief in reply to the brief of Gallagher Brothers Sand & Gravel Corporation, the respondent-impleaded-appellee" but it then argues:

> "POINT I. HICKEY DID NOT BREACH ANY DUTY WITH RESPECT TO THE SCOW TRIBORO #12."
>
> "POINT II. TRIBORO SCOW CORPORATION and GALLAGHER BROTHERS SAND & GRAVEL CORPORATION ARE CLEARLY GUILTY OF NEGLIGENCE IN CONNECTION WITH THE DAMAGE TO THE TRIBORO #12."

These Points, not argued or presented in Hickey's main brief on appeal and which petitioner had no opportunity to answer, appear to be embraced in the Court of Appeals' opinion.

The so-called reply brief further states:

> "In order to assist this court in pinpointing the actual testimony as to the times of the various oc-

currences appellant has prepared and sets forth herein a chart listing the actual times testified to and giving specific citations to the record."

Hickey then cites testimony on the credibility of which the Trial Court had passed and which the Trial Court had rejected.

Thus, being unwilling to make a direct attack on any finding of the Trial Court, which it knew was destined to failure because these findings were based on admissions of its own witnesses, Hickey invited the Court of Appeals to make a completely new appraisal of so much of the evidence in the case as it directed to the Court's attention. That the Trial Court had seen a parade of witnesses, who over 4 days gave 604 pages of testimony, was of no more moment than that the Trial Court based its decision on indisputable facts which fitted the case squarely into the controlling law laid down by the Court of Appeals in prior similar cases.

In its "reply" brief (Appendix, p. 41) without attacking the Trial Court's finding 23 that Hickey should have moved the scow between 7:00 A. M. and 8:00 A. M., Hickey attempted to lead the Court of Appeals to believe that the time interval between delivery of the cargo and the difficulties of the scow was only 10 or 15 minutes. It says:

> "It will be seen that Geddes, Chambers and Gilmartin all agree that the Triboro No. 12 was listing and in difficulty between 7:45 and 8:00 o'clock"

which is directly contrary to the final admissions of the witnesses named that this occurred at 8:30 A. M. and it likewise is contrary to the Trial Court's finding (Finding 21, p. 14).

The second facet of Hickey's argument in its "reply" brief which was adopted by the Court of Appeals (124),

was its claim that delivery of the cargo could not have been effected as of 7:00 A. M. even though the written receipt expressly so stated, because measuring then had not been completed. The Court of Appeals acted in conflict with the New York Personal Property Law, which in Section 129 provides:

> "The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them * * *."

And, in Section 100, provides:

> "2. When goods are delivered to the buyer on approval or on trial or on satisfaction, or other similar terms, the property therein passes to the buyer * * *
>
> (a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction;"

The material laden on the TRIBORO 12 was bought by Hickey subject to the measuring and inspection which were commenced before 7:00 A. M. (Finding 15, p. 14). When Hickey's representatives boarded the TRIBORO No. 12 before 7:00 A. M., they conditionally accepted delivery of the cargo as of that time and this was made final as of 7:00 A. M. by the signed receipt which so stated. Thus from the time that Hickey's employees boarded the scow before 7:00 A. M., it was in their custody and possession and the petitioner had no right to move the TRIBORO 12 away. The testimony was clear that a terminal operator like Hickey must be left free to arrange scows at its mooring facilities in order to be able to move them around and discharge them most expeditiously and economically. Hickey made no effort at the trial to dispute that by

custom, practice and necessity the consignee of cargo on scows must arrange the scows to suit its convenience (p. 134).

The Court of Appeals herein in reversing the District Court expressly refused to apply its own precedents, application of which was compelled by the findings of fact of the Trial Court and which required affirmance of the District Court and it said:

> "each case depends on its own facts." (126)

The Court of Appeals then ruled on the issue of negligence relying on "facts" other than those found by the District Court.

The Trial Court had said:

> "But as aforestated the receipt was unconditional. Having received the cargo, Hickey owed the libellant's scow the duty of reasonable care * * *." (10)

In contrast the Court of Appeals said:

> "The trial court placed great significance on this paper." (124)

and

> "Hickey too was under a duty to exercise reasonable care. Although there is a serious question as to whether there was proper delivery of the scow in its precarious position, *this issue need not be determined* because the facts show that Hickey took such steps as were reasonable and feasible to try to remedy the situation presented to if by Gallagher and Triboro." (126)

The facts referred to in this quotation cannot be the facts found by the Trial Court which expressly held, based

on admissions of Geddes, Gilmartin and Chambers, that *no timely* steps to prevent damage to the scow had been taken by Hickey (9, 10, 11, 14—Finding 21). The Court of Appeals did not indicate on what testimony it relied in reaching its conclusion as to the facts and it did not refer to any specific testimony or in any way attempt to demonstrate that the findings of fact of the Trial Court should not be accepted.

Reasons for Granting Writ

The Court of Appeals for the Second Circuit said in *Verbeeck* v. *Black Diamond Steamship Corp.*, June 18, 1959—269 F. (2d) 68 at 70:

> "As we have steadily held, negligence is a conclusion of law which we review."

The decision of the Court of Appeals herein is a further application of that view.

In *Pacific Tow Boat Company* v. *States Marine Corporation*, 276 F. (2d) 745, the Court of Appeals for the Ninth Circuit said at page 752:

> "We have not overlooked appellant's contention, perhaps applicable to all the specifications of error, that a determination that a party is or is not negligent is a conclusion of law. Appellants argue from this that such a trial court determination is not protected by the 'clearly erroneous rule' announced in McAllister v. United States, 348 U. S. 19, 75 S. Ct. 6, 8, 99 L. Ed. 20, and that this court should make its own independent determination on the question of negligence. The view thus presented, as appellants point out, has long prevailed in the Second Circuit, and has not been modified in that circuit since McAl-

lister was decided. Verbeeck v. Black Diamond Steamship Corp., 2 Cir., 269 F. (2d) 68, 70, and cases there cited.

In the McAllister case the Supreme Court dealt specifically with a 'finding of fact' that the master of the ship was negligent. It was with respect to this finding that the court there held that 'no greater scope of review is exercised by the appellate tribunals in admiralty cases than they exercise under Rule 52(a) of the Federal Rules of Civil Procedure.' Since that decision this court has uniformly regarded determinations as to negligence made in admiralty cases as findings of fact which are not to be overturned unless clearly erroneous."

Besides being in conflict with the decision of the Ninth Circuit in *Pacific Towboat Company* v. *States Marine Corporation*, 276 F. (2d) 745, the decision herein is in conflict with the decisions of other Circuits:

Tyndall v. *Conduit and Foundation Company*, 269 F. (2d) 947 (C. A. 3);
B. & M. Towing Company v. *Wittliff*, 258 F. (2d) 473 (C. A. 5);
Imperial Oil Ltd. v. *Drlik*, 234 F. (2d) 4 (C. A. 6).

Thus, even since decision by the Supreme Court of *McAllister* v. *United States*, 348 U. S. 19, there is misunderstanding and disagreement between the several Courts of Appeals as to what are their powers of review.

The Court of Appeals for the Second Circuit has left no room for doubt as to what it believes its powers to be. This is demonstrated by its language in *Verbeeck* v. *Black Diamond Steamship Corp.*, 269 F. (2) 68, as well as by its decision herein.

The decision of the Court of Appeals herein is in direct conflict with the decision in *McAllister* v. *United States*, 348 U. S. 19, and constitutes a serious error of law. Since it involves the limit and scope of appeals in cases tried to a Judge without a jury, it is constantly recurring. It is not a question of law limited to a specific set of facts, but it is a question which runs the gamut of every negligence case tried without a jury which is appealed.

The propriety of the order of reversal of the Court of Appeals comes to the Supreme Court as a question of law. Petitioner does not ask the Supreme Court to re-evaluate the whole case. Petitioner instead asks the Supreme Court to nullify the exercise again of a power by the Court of Appeals which the Supreme Court denied to it in *McAllister* v. *United States*, 348 U. S. 19, but which the Court of Appeals continues to assume.

Where the Court of Appeals, in reversing a judgment of a District Court has committed a palpable error of law, the Supreme Court has vacated the judgment of the Court of Appeals and has reinstated the decision of the District Court, *Palermo* v. *Luckenbach S.S. Co.*, 355 U. S. 3.

The decision of the Court of Appeals herein is in derogation of Admiralty Rule 46½ of this Court, it is in conflict with the Rule of Review in Admiralty in other Circuits and in adopting the argument contained in a so-called reply brief which was filed by the appellant below 14 days after oral argument instead of 1 day before argument as is required by the Court of Appeals, Second Circuit, Rule 15(a), sets a wholly undesirable pattern for appeals. At the same time the decision nullifies practices which have controlled and made orderly the dealings between vessel owners and consignees of cargo on vessels for many, many years and it has unsettled the law governing the rights and duties obtaining as between a vessel owner and the consignee of its cargo.

CONCLUSION

A writ of certiorari should be granted in accordance with the prayer of this petition and the order of the Court of Appeals should be reversed and the judgment of the District Court should be reinstated.

Respectfully submitted,

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Dated: New York, N. Y.,
December 9th, 1960.

VINCENT A. CATOGGIO,
of Counsel.

APPENDIX

Opinion of the Court of Appeals, 280 F. (2) 308 (121)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 353—October Term, 1959.

(Argued May 10, 1960 Decided July 12, 1960.)

Docket No. 26155

TRIBORO SCOW CORPORATION, as owner of Scow Triboro No. 12,

Libellant-Appellee,

—v.—

M. F. HICKEY CO. INC.,

Respondent-Appellant,

—and—

GALLAGHER BROTHERS SAND & GRAVEL CORPORATION and Tug John Murray,

Respondent-Claimant-Impleaded Appellee.

Before:

CLARK, MOORE and FRIENDLY, *Circuit Judges.*

Appeal by respondent M. F. Hickey Co. Inc. from an interlocutory decree of the United States District Court for the Eastern District of New York, Leo F. Rayfiel, *D.J.*, 177 F. Supp. 636, holding respondent liable for damages to libellant and dismissing the impleading petition against

(122) respondents-impleaded-appellees Gallagher Brothers Sand & Gravel Corporation and Tug John Murray.

Reversed as to decree against M. F. Hickey Co. Inc. and affirmed as to dismissal of the impleading petition.

VINCENT A. CATOGGIO, New York, N. Y. (Purdy, Lamb & Catoggio), *for Libellant-Appellee.*

JAMES M. LEONARD, New York, N. Y. (Macklin, Speer, Hanan & McKernan and Gerald J. McKernan), *for Respondent-Appellant.*

EDWARD J. RYAN, New York, N. Y. (Foley & Martin), *for Respondent-Claimant-Impleaded Appellee.*

MOORE, *Circuit Judge*:

Libellant, Triboro Scow Corporation (Triboro) brought suit against M. F. Hickey Co. Inc. (Hickey) for damages to Triboro's scow No. 12 alleged to have resulted from Hickey's negligence. Hickey, denying negligence and claiming that the damage was caused by the negligence of Gallagher Brothers Sand and Gravel Corporation (Gallagher) and the tug "John Murray" owned by it, impleaded Gallagher. From an interlocutory decree holding Hickey solely liable for damages to the scow, Hickey appeals.

Hickey had ordered a cargo of sand and gravel from Gallagher for delivery at Hickey's plant on or about January 25, 1956. Gallagher to make delivery used the "Triboro No. 12" then under charter to it and caused the scow to be towed by Gallagher's tug, the "John Murray," to Hickey's plant at East Mill Basin, Brooklyn, New York, where tug and tow arrived between 1:00 and 1:30 A.M. on January 25, 1956.

Hickey maintained a bulkhead some 250 feet in length on the east side of the Basin, running approximately north

(123) and south. The water alongside the bulkhead and outshore therefrom was adequate to provide a safe berth for scows. This fact is not disputed. When the "Triboro No. 12" arrived there were three other scows at the plant, the "Hunts Point" moored alongside the bulkhead (bow facing north), the "McCormack 84" tied outshore against the "Hunts Point" (bow facing south) and the "Amherst" still further out and made fast to the "McCormack 84." The Gallagher tug brought the "Triboro No. 12" in bow facing north. A line attached at the starboard stern corner of the "Triboro No. 12" was then passed to the captain of the "Amherst" who fastened it to the starboard bow corner of the "McCormack 84." The same tug then took the "Amherst" in tow, moved it from its position and placed the "Triboro No. 12" alongside the "McCormack 84" in the position formerly occupied by the "Amherst." At this stage the bow starboard corner of the "McCormack 84" and the starboard stern corner of the "Triboro No. 12" were practically alongside. A line from the starboard bow of the "Triboro No. 12" to the starboard stern of the "McCormack 84" would then have made the "Triboro No. 12" secure to the "McCormack 84" as the "Amherst" had been. However, the captain of the "Triboro No. 12" was unable to get this highly essential line attached. Without being assured that the scow had been made fast and despite the captain's calls to the tug, the Gallagher tug proceeded on its way with the "Amherst" leaving the "Triboro No. 12" with only one line out at the mercy of a substantial wind (estimated at 20 miles per hour) and the current. Attached only at their respective adjacent starboard bow and stern corners, there were no means of keeping the scow alongside the "McCormack 84" and it gradually pivoted in a westerly counter-clockwise direction until its stern was approximately opposite the bow of the "McCormack 84." The "Triboro No. 12" was now heading in a southerly direction with only some 10 feet of its 116-

foot length in the berth maintained by (124) Hickey, the balance being over an area of shallow water, underwater piles and a submerged wreck. Shortly thereafter another tug brought in its scow, the "Steers 71," and placed it securely alongside the "McCormack 84" where the "Triboro No. 12" had been and should have been.

The captain of the "Triboro No. 12" retired at about 3:00 A.M., apparently satisfied with the scow's position, although he had taken no soundings nor had sought aid from the second tug or from any other source. In the morning, the captain seeing the position of the scow did not advise his employer, the owner, of the situation but proceeded to go ashore and to the city to collect his wages.

Thus far Hickey was without knowledge of, and without responsibility for, the scow's position. The scow had been brought in at dead of night in the custody and control of Gallagher and the captain, an employee of Triboro. Its position was attributable solely to them. At or about 7:00 A.M. Hickey for the first time had an opportunity to observe the situation. Some time between 7:00 and 7:30 A.M. the contents of the scow were measured by employees of Gallagher and Hickey. Thereafter a receipt for the cargo was signed by a Hickey employee. Although the paper contains the words "Received from Gallagher Bros. Sand & Gravel Corp." its primary purpose was to record the measurements of the cargo. In heavy letters the word "MEASURED" is printed, followed by "By Nick . . . Time 7 A.M. N. Y. Jan. 25th 1956." Then under the captions "DEPTHS," "TOP WIDTHS" and "DIMENSIONS OF SCOW" are written various measurements.

The trial court placed great significance on this paper. Although the court said that the receipt was "signed at 7:00 A.M. on January 25, 1956," he also found that "Zappoli and Torro completed the measurement of the cargo between 7:00 and 7:30 A.M. after which Zappoli went to the Hickey office where James C. Chambers, Hickey's dis-

patcher, who was in charge of the yard, signed a receipt (125) for the cargo" and that Hickey had acknowledged receipt "as of 7:00 A.M." The court stressed the facts that (1) the receipt "contained no statement to indicate that the scow was not in a proper place" and (2) if the position of the "Triboro No. 12" were not satisfactory Chambers "would have noted it on the receipt or would have refused to sign it." The assumption, however, that Hickey by acknowledging measurements and receipt of the cargo "as of 7:00 A.M." thereby approved of the position in which Triboro and Gallagher had left the scow is not justified. The proof is clear that Hickey protested to Gallagher and requested remedial action. In addition Hickey endeavored by use of its tractor crane on its dock to move the scow and even tried to call various tugboat operators whose tugs might be in the vicinity. These efforts were unsuccessful. With the falling tide the scow settled on some submerged object, bottom planks were broken, the scow filled with water and capsized.

The legal principles applicable are rather well established. Hickey was under a duty to supply a safe berth. *Smith* v. *Burnett*, 173 U. S. 430 (1899); *Waldie* v. *Steers Sand & Gravel Corp.*, 2 Cir., 1945, 151 F. 2d 129. This duty it fulfilled.

Gallagher as owner and operator of the tug had the responsibility of towing the scow to its destination and making sure that it was properly secured. *James McWilliams Blue Line, Inc.* v. *Esso Standard Oil Co.*, 2 Cir., 1957, 245 F. 2d 84; *Pittsburgh Consolidated Coal Co.* v. *Harrison Construction Co. et al.*, 3 Cir., 1955, 223 F. 2d 260. This responsibility was not fulfilled.

Triboro's captain could not stand by without taking any action when it became obvious that his scow was far removed from its intended berth. *The Castleton*, 2 Cir., 1933, 64 F. 2d 11; *C. F. Harms Co.* v. *Turner Const. Co.*, 2 Cir., 1924, 2 F. 2d 591.

(126) Hickey too was under a duty to exercise reasonable care. Although there is a serious question as to whether there was proper delivery of the scow in its precarious position, this issue need not be determined because the facts show that Hickey took such steps as were reasonable and feasible to try to remedy the situation presented to it by Gallagher and Triboro.

Triboro relies on such cases as *C. F. Harms Co.* v. *Erie R.R. Co. et al.*, 2 Cir., 1948, 167 F. 2d 562 and *The Everett Fowler*, 2 Cir., 1945, 151 F. 2d 662, in support of the general proposition that the consignee is under a duty of reasonable care. The abstract principle is, of course, sound but in its application "the degree of care . . . usually must be gathered by reconstructing the relations between the parties in their entirety" (*New York Trap Rock Corporation* v. *Christie Scow Corporation*, 2 Cir., 1947, 162 F. 2d 624, 627).

The one generality which may be safely asserted after examination of many scow cases including *The Eastchester*, 2 Cir., 1927, 20 F. 2d 357, *N. Y. Trap Rock Corporation* v. *Metropolitan No. 4*, 2 Cir., 1942, 128 F. 2d 831 and *F. E. Grauwiller Transp. Co.* v. *Gallagher Brothers Sand & Gravel Corporation*, 2 Cir., 1949, 173 F. 2d 708, is that each case depends upon its own facts. The courts have endeavored to answer the question: who really was responsible for the situation which caused the damage? The problem is often difficult to resolve because usually only the borderline cases reach the courts. Here, however, both on the law and the facts liability cannot fairly be imposed on Hickey.

Accordingly, the interlocutory decree against M. F. Hickey Co. Inc. is reversed and the dismissal of the impleading petition against Gallagher Brothers Sand & Gravel Corporation affirmed.

(127)

APPENDIX

Judgment

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twelfth day of July one thousand nine hundred and sixty.

Present:

HON. CHARLES E. CLARK,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
Circuit Judges.

TRIBORO SCOW CORPORATION, as owner of the TRIBORO No. 12,

Libelant-Appellee,

v.

M. F. HICKEY CO., INC.,

Respondent-Appellant,

DOUGLAS JAMES,

Respondent,

v.

GALLAGHER BROS. SAND & GRAVEL CORP. and Tug JOHN MURRAY,

Respondents-Impleaded Appellees.

Appendix.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the interlocutory decree against M. F. Hickey Co., Inc. of said District Court be and it hereby is reversed and that the dismissal of the impleading petition against Gallagher Brothers, Sand & Gravel Corporation, be and it hereby is affirmed in accordance with the opinion of this court with costs to the appellant M. F. Hickey Co., Inc.

A. Daniel Fusaro, Clerk

By

Niall F. O'Doherty
Chief Deputy Clerk

(146)

APPENDIX

Memorandum Denying Petition for Reargument

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

TRIBORO SCOW CORPORATION, as owner of
SCOW TRIBORO No. 12,

Libelant-Appellee,

v.

M. F. HICKEY CO., INC.,

Respondent-Appellant,

and

GALLAGHER BROTHERS SAND & GRAVEL CORPORATION
and Tug JOHN MURRAY,

Respondent-Claimant-Impleaded Appellee.

Before CLARK, MOORE, and FRIENDLY, Circuit Judges.

On Petition for Rehearing.

Vincent A. Catoggio, of Purdy, Lamb & Catoggio, New York City, for Libellant-Appellee.

PER CURIAM,

Petition for rehearing denied.

C. E. C.
L. P. M.
H. J. F.
U.S.C.J.J.

Sept. 15, 1960

(148)

APPENDIX

Order Denying Petition for Reargument

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifteenth day of September, one thousand nine hundred and sixty.

Present:

HON. CHARLES E. CLARK,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
Circuit Judges.

TRIBORO SCOW CORPORATION, as owner of Scow No. 12,

Libellant-Appellee,

v.

M. F. HICKEY CO., INC.,

Respondent-Appellant,

and

GALLAGHER BROTHERS SAND & GRAVEL CORPORATION and Tug JOHN MURRAY,

Respondent-Claimant-Impleaded Appellee.

A petition for a rehearing having been filed herein by counsel for the libellant-appellee,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro
Clerk

(6)

APPENDIX

District Court Opinion

RAYFIEL, J.:

The libelant brought this action to recover for damages sustained by its scow, "Triboro No. 12", which capsized on January 25, 1956 by reason of the alleged negligence of the respondents, M. F. Hickey Co., Inc., hereinafter called Hickey, and Douglas James. Hickey denied its negligence and impleaded Gallagher Brothers Sand and Gravel Corporation, hereinafter called Gallagher, alleging in its impleading petition that it (Hickey) was not negligent, but that the "Triboro No. 12" sustained the damage by reason of the negligence of the tug "John Murray", owned and operated by Gallagher.

During the course of the trial the action against the respondent Douglas Jaines was discontinued by the libelant.

The facts are as follows: The libelant's vessel, "Triboro No. 12", was a wooden deck scow 116.6 feet long, 35.7 feet wide, and had a registered depth of 9 feet and one foot freeboard. At either end of her deck she had a (7) bulkhead, which was 8 feet high at her bow and 10 feet high at her stern. Her captain testified that on January 25, 1956 she was sound and did not leak. She had been chartered by Gallagher, and her cargo of sand and gravel, loaded to a maximum height of 8 feet on her deck, was consigned to Hickey at its plant at East 69th Street and Avenue X, in Mill Basin, Brooklyn, New York.

At about 1.00 A.M. on January 25, 1956 she was towed by the tug "John Murray" to the vicinity of the Hickey plant, which had a bulkhead facing Mill Masin, some 250 feet long, and running north and south. Prior to the arrival of the "Triboro No. 12" three scows were made fast, all lengthwise, to the Hickey bulkhead. One, the "Hunts Point", was made fast to the bulkhead; outside of and made fast to the "Hunts Point" was the "McCormack

84", and outside of and made fast to the latter was the "Amherst". The latter was light, and was to be removed by the tug which was to bring the "Triboro. No. 12" in. The "John Murray" brought the latter in stern first on her (the tug's) port side. The captain of the "No. 12" passed a line to the "Amherst's" captain who placed it on the "McCormack 84". This line ran from the "No. 12's" starboard stern corner to the starboard bow corner of the "McCormack 84" and had about twenty feet of slack. The tugs then removed the "Amherst" and maneuvered the "No. 12" into the position which the "Amherst" had occupied alongside the "McCormack 84". She thus became the third scow out from the Hickey bulkhead. The temperature at that time was 22 degrees and the wind was from the northwest at 20 miles per hour.

The captain of the "No. 12" then tried to throw another line onto the bitt on the starboard stern corner of the "McCormack 84" but due to the darkness and the stiffness of the line, caused by the ice thereon, he failed. He tried again, and again he failed. Having been unable to reach the bitt on the "McCormack 84", he crossed the bow of his scow in order to call to the tug for assistance. However, (8) the tug had already taken the "Amherst" in tow and had started to leave. The captain of the "No. 12" yelled to those on board the tug, but because of the strong wind and the distance between them it is unlikely that anyone on board heard him, and she proceeded on her way. The "No. 12", with only one line holding her to the "McCormack 84", drifted away from her because of the wind and the current, and she pivoted around so that her stern was behind the "McCormack 84", but off at an angle from her bow. The captain of the "No. 12" then pulled himself in toward the "McCormack 84" manually on the one line he had out, using his capstan until he got his stern close enough to the bow of the "McCormack 84" to permit him to board her.

When he did he put on two additional lines. He described the three lines he then had out as a hawser on his port side, a dock line and a running line on the starboard side, all three of which were made fast to the bow bitts of the "McCormack 84" from the stern bitts of his scow.

This operation was concluded at 3.00 A.M. Between 1.30 and 3.00 A.M., on that day, while he was engaged in said operation, a tug put another barge, the "Steers 71", into the position which had originally been occupied by the "Amherst", and tied her alongside of the "McCormack 84". The four scows were in the position shown on Hickey Exhibit 3. The "Hunts Point" was alongside the Hickey bulkhead, the "McCormack 84" was outside of and made fast to her, the "Steers 71" was outside of and made fast to the "McCormack 84", and the "No. 12" was behind the "McCormack 84", with her stern close to the bow of the latter. About 10 feet of the total length of the "No. 12" lay in the waters off the Hickey bulkhead while the remainder thereof, some 106 feet, lay in the waters off the property adjoining on the south.

The captain of the "No. 12" went to sleep at about 3.00 A.M. and he woke at about 6.30 A.M. Between 6.30 and 7.00 A.M. one Nicholas Zappoli, an employee of Gallagher, came aboard the "No. 12" with Richard Torro, an (9) employee of Hickey, for the purpose of measuring the cargo. After they boarded her the captain of the "No. 12" left the scow to collect his pay. Zappoli and Torro completed the measurement of the cargo between 7.00 and 7.30 A.M. after which Zappoli went to the Hickey office where James G. Chambers, Hickey's dispatcher, who was in charge of the yard, signed a receipt for the cargo.

During this period the scow appeared to be in no difficulty, and was not leaking. Sometime between 8.00 and 8.30 A.M. the "No. 12" commenced filling with water, and listing. Hickey's employees then attempted to move her in

a northerly direction in order to bring her closer to the Hickey property so that her cargo could be discharged, but they were unsuccessful. Chambers attempted to get a tug to move her, but none was available, and at 9.30 A.M. she capsized.

Photographs taken after the occurrence revealed a hole in her bottom planking, which was caused by her coming to rest on a submerged object when the tide fell. The charts received in evidence showed underwater obstructions, described in the testimony as a wreck, at the place where the "No. 12" was moored, at a point where the depth ranged from 4.9 feet to 7.2 feet at mean low water. Libelant's Exhibit 3, a chart which showed the height of the recorded tide on January 25, 1956, reveals that the tide had started to ebb at 5.45 A.M., that it was 5 feet above mean low water at 7.00 A.M., 3.9 to 4 feet at 8.00 A.M. and about 1.6 feet above mean low water at 9.50 A.M. when the "No. 12" capsized.

The libelant contends that Hickey was negligent in permitting the "No. 12" to remain in what is characterized as a foul berth after it had accepted the cargo. It points out that Geddes and Gilmartin, Hickey employees, testified that they saw the position of the "No. 12" at about 7.00 A.M. and knew that she was in a bad berth by reason of the shallowness of the water there, but that nothing was done about it until about 8.30 A.M. when she had already begun to fill with water and list.

(10) Hickey denies that it was negligent. It contends that both the libelant's scow captain and the crew of Gallagher's tug were negligent in failing to deliver the "No. 12" properly. It points out that only 10 feet of the "No. 12's" length were in the waters off the Hickey bulkhead, and that about 110 feet were in the waters off the property to the south. It argues further that Gallagher's tug should not have left with the "Amherst" until the "No. 12" had been

tied up alongside of the "McCormack 84", where there was plenty of depth to accommodate her at mean low water, instead of leaving her fastened by only one line; that the captain of the "No. 12" should have signalled to the tug with his flashlight, when he saw that it was leaving him in a precarious position, and, also, that after tying up his scow he should have notified the libelant, Gallagher or Hickey that he had not been properly delivered. Further, Hickey contends that the captain of the "No. 12" was negligent in leaving her without taking soundings which would have revealed that the water was too shallow for the "No. 12" at the place where she lay.

I disagree with Hickey's contentions. Hickey's employees knew at 7.00 A.M. that the "No. 12" was in an unsafe place and that its position would become even more precarious with an ebbing tide. Yet, the receipt for the cargo on the "No. 12" (Libelant's Exhibit 4) which Chambers signed at 7.00 A.M. on January 25, 1956 contained no statement to indicate that the scow was not in a proper place or that the cargo was delivered in other than good condition. Chambers impressed me as an alert and intelligent man. I am quite sure that if either the cargo or the position and condition of the "No. 12" were other than satisfactory he would have been advised of that fact by the other Hickey employees, particularly the person who assisted in the measuring operation, and would have noted it on the receipt or would have refused to sign it. But, as aforestated, the receipt was unconditional. Having received the cargo, Hickey owed the libelant's scow the duty (11) of reasonable care, particularly since, as Geddes and Gilmartin both testified, they knew she was in a bad berth, and Hickey could have moved her between 7.00 A.M. and 8.00 A.M. when, unquestionably, she was still afloat, and not in difficulty.

A similar question was involved in C. F. Harms Co. v. Erie R. Co., 167 F. 2d 562, in which Judge Learned Hand said, at page 563, "We have several times decided that the relation of bailor and bailee, stricti juris, is not necessary in order to impose upon a consignee, or other person with whom a barge may be left, the duty of reasonable care to protect her until the owner or the charterer takes her back into possession."

In my opinion, Hickey failed to use reasonable care in permitting the "No. 12" to remain in the position behind the "McCormack 84". It had adequate equipment at its plant to move scows back and forth along its bulkhead and it should have moved her between 7.00 and 8:00 A.M. instead of permitting her to remain in a place which its own employees knew was dangerous, a fact which was unknown to the captain of the "No. 12".

As to Hickey's argument that the "No. 12's" captain should not have left her, there was no proof of any requirement that he should have remained aboard. See Charlotte R. Jacobus v. Scow "Triboro No. 22", 267 F. 2d 547.

I have considered the other arguments advanced by Hickey against both the libelant and Gallagher, and find them without merit.

Accordingly, libelant is entitled to a decree against Hickey, and Hickey's impleading petition against Gallagher is dismissed.

Submit findings of fact, conclusions of law and decree in conformity herewith.

Dated: October 16, 1959.

LEO F. RAYFIEL,
United States District Judge.

(12)

APPENDIX

District Court's Findings of Fact and Conclusions of Law

FINDINGS OF FACT.

RAYFIEL, *J.*:

1. On January 25, 1956 the libelant was the owner of the wooden deck scow, "Triboro #12" which was 116.6 feet long, 35.7 wide, had a registered depth of 9 feet and one foot freeboard. At either end of her deck she had a bulkhead which was 8 feet high at her bow and 10 feet high at her stern.

2. She was sound and did not leak.

3. She had been chartered by Gallagher Sand & Gravel Corporation and had been loaded with a cargo of sand and gravel to a maximum height of 9 feet on her deck, which was consigned to the respondent, M. F. Hickey Co., Inc., at its plant at East 69 Street and Avenue X in Mill Basin, Brooklyn, N. Y.

4. The Hickey plant had a bulkhead facing Mill Basin, about 250 feet long, which ran north and south.

5. At about 1.00 P.M. on January 25, 1956 the "Triboro #12" was towed to the Hickey plant by the tug "John Murray" which was owned by Gallagher.

6. Prior to her arrival three scows were made fast lengthwise to the Hickey bulkhead. One, the "Hunts Point", was alongside the bulkhead and made fast thereto; outside of and made fast to her was the "McCormack 84" and outside and made fast to the latter was the "Amherst"; the latter scow was light and was to be removed by the tug which was to bring the "Triboro #12" in.

7. The tug "John Murray" brought the "Triboro #12" in stern first on the tug's port side. The captain of the "Triboro #12" passed a line to the "Amherst's" captain who placed it on the "McCormack 84". This line

(13) ran from the "Triboro #12's" starboard stern corner to the starboard bow corner of the "McCormack 84", and had about twenty feet of slack. The tug then removed the "Amherst" and maneuvered the "Triboro #12" into the position which the "Amherst" had occupied alongside the "McCormack 84".

8. The captain of the "Triboro #12" then tried to throw another line onto the bitt at the starboard stern corner of the "McCormack 84" but was unsuccessful. He tried again, and again he failed. He then attempted to call to the tug for assistance, but it had already taken the "Amherst" in tow and had started to leave. Evidently no one on board the tug heard the shouts and she proceeded on her way.

9. The temperature at that time was 22 degrees and the wind was from the northwest at 20 miles per hour.

10. The "Triboro #12" with only one line holding her to the "McCormack 84", drifted away from her because of the wind and the current, and she pivoted around so that her stern was behind the "McCormack 84", but off at an angle from the latter's bow.

11. The captain of the "Triboro #12" pulled himself in toward the "McCormack 84" manually on the one line he had out, using his capstan until he got his stern close enough to the bow of the "McCormack 84" to permit him to board her. He then put on two additional lines.

12. He concluded this operation at 3.00 A.M. Between 1.30 and 3.00 A.M. a tug put another barge, the "Steers 71" in the position which had originally been occupied by the "Amherst", and tied her alongside the "McCormack 84".

13. The four scows were then in the following positions: The "Hunts Point" was alongside the Hickey bulkhead, the "McCormack 84" was outside of and made fast to her, the "Steers 71" was outside of and made fast to the "McCormack 84" with her stern close to the latter's bow.

(14) 14. About 10 feet of the total length of the "Triboro #12" lay in the waters off the Hickey bulkhead while the remainder thereof, some 106 feet, lay in the waters off the property adjoining on the south.

15. Between 6.30 and 7.00 A.M. Nicholas Zappoli, an employee of Gallagher, came aboard the "Triboro #12" with Richard Toro, an employee of Hickey, for the purpose of measuring the cargo. After they boarded her her captain left to collect his pay.

16. While Zappoli and Toro were on board the scow she appeared to be in no difficulty and was not leaking.

17. After the measurement of the cargo was completed Zappoli went to the Hickey office where James G. Chambers, Hickey's dispatcher, who was in charge of the yard, signed a receipt for the cargo which was marked 7.00 A.M.

18. The tide had started to ebb at 5.45 A.M. It was 5 feet above mean low water at 7.00 A.M., 3.9 to 4 feet at 8.00 A.M. and about 1.6 above mean low water at 9.30 A.M.

19. Geddes and Gilmartin, employees of Hickey, saw the position of the "Triboro #12" at 7.00 A.M. and knew she was in an unsafe place by reason of the shallowness of the water and the presence of a submerged wreck.

20. Hickey had at its yard a cargo crane which it used to move and unload scows; it was operated by Geddes.

21. At about 8.30 A.M. the "Triboro #12" began to fill with water and list. Geddes, by the use of the crane, attempted to move the "Triboro #12". He then attempted to unload her, but without success.

22. At 9.30 A.M. the "Triboro #12" capsized and sank by reason of the fact that her bottom had been pierced and penetrated by some underwater object as she lay moored to the stern of the "McCormack 84".

(15) 23. Hickey's employees should have moved the "Triboro #12" to a safe berth between 7.00 A.M. and 8.00 A.M., instead of permitting her to remain in a place which they knew was dangerous.

24. The respondent Hickey failed to fulfill its duty to furnish a safe berth to the "Triboro #12" and failed to act with reasonable care with respect to her.

CONCLUSIONS OF LAW.

1. The libelant was not negligent and her captain was not negligent in leaving the scow after *Hickey* had acknowledged the receipt of the cargo as of 7.00 A.M. January 25th, 1956.

2. After *Hickey* signed the receipt for the cargo on the "Triboro #12" it was under a duty to use reasonable care to protect her from damage.

3. After *Hickey* signed the receipt for the cargo on the "Triboro #12" it failed to exercise reasonable care to protect the "Triboro #12" from damage.

4. Neither *Gallagher Brothers Sand & Gravel Corp.*, nor its tugboat, the "John Murray", was guilty of negligence which caused or contributed to the damage sustained by the "Triboro #12".

5. The damage sustained by the "Triboro #12" resulted wholly and solely from the failure of *Hickey* to discharge its duty to care for the "Triboro #12" after *Hickey* signed the receipt for the cargo.

6. The libelant will have a decree against *M. F. Hickey Co., Inc.*, and the impleading petition against *Gallagher Brothers Sand & Gravel Corporation* will be dismissed.

Dated: January 15, 1960.

/s/ LEO F. RAYFIEL,
United States District Judge.

APPENDIX

Reply Brief of Hickey in Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 26155

TRIBORO SCOW CORPORATION, as owner of SCOW TRIBORO No. 12,
Libellant-Appellee,

against

M. F. HICKEY CO., INC.,
Respondent-Appellant,

and

GALLAGHER BROTHERS SAND & GRAVEL CORPORATION and Tug JOHN MURRAY,
Respondent-Claimant-Impleaded Appellee.

RESPONDENT-APPELLANT'S REPLY BRIEF

STATEMENT.

Respondent-appellant, M. F. Hickey Co., Inc., makes this brief in reply to the brief of Gallagher Brothers Sand & Gravel Corporation, the respondent-impleaded-appellee.

It would appear from the admissions contained in the brief of respondent-impleaded-appellee that the principles of law set forth in appellant's brief are accepted by Gallagher Brothers. It is simply the applicability of those principles to the cause at bar with which Gallagher now quibbles.

Appendix.

(2)

POINT I.

HICKEY DID NOT BREACH ANY DUTY WITH RESPECT TO THE scow *Triboro No. 12.*

Gallagher's brief contains the following contentions:

(a) Chambers, the Manager of the Hickey plant, signed the measurement slip at 7:00 a.m. on January 25, 1956 (Gallagher's brief, p. 2);

(b) The scow was undamaged, not leaking and floating on an even keel at the time the slip was signed (Gallagher's brief, p. 2);

(c) Hickey employees "*including the crane operator*" started to work at about 7:00 a.m. (Gallagher's brief, p. 3);

(d) Sannelli, Hickey's laborer, testified that no attempt was made to shift the scow until after it had capsized (Gallagher's brief, p. 3);

(e) (By innuendo) the crane operator did not attempt to move the scow *Triboro No. 12* (Gallagher's brief, p. 3).

These and other similar erroneous contentions were made by Gallagher's counsel (and indeed by Triboro's counsel) upon the oral argument of this appeal. In order to assist this Court in pin-pointing the actual testimony as to the times of the various occurrences appellant has prepared and sets forth herein a chart listing the actual times testified to and giving specific citations to the record.

FRANCIS GEDDES (*Engineer and Crane Operator for Hickey*)

Occurrence	*Time*	*Page*
Arrived at Hickey premises on 1/25/56	7:30	R.366; AA.81*
	7:30	R.374; AA.86
Time at which regularly arrived at work	Between 7:00 & 8:00	R.374; AA.86
	"Makes own hours"	R.375; AA.87
Notified of trouble at dock	7:45	R.377; AA.87

*"R" refers to pages of Record on Appeal; "AA" refers to pages of Appellant's Appendix.

Appendix.

(3)

Occurrence	*Time*	*Page*
Proceeded to dock without crane to observe scows	7:50	R.370; AA.85
	7:45	R.421; AA.96
	7:45	R.442; AA.99
First observed *Triboro No. 12* listing	7:45	R.442; AA.99
	7:45	R.451; AA.101
Yelled at Hickey employee, *W Gilmartin* who was inspecting *Triboro No. 1* to get off	8:00	R.383; AA.89
	8:00	R.384; AA.89
Attempted to move scows	8:00-8:15	R.366; AA.83
	8:15-8:30	R.383; AA.89
Scow capsized	9:30	R.388; AA

RICHARD TORRO (*Laborer for Hickey*)

Measurement of the scow was completed	7:30	R.513; AA.111
		R.516-517; AA

JAMES CHAMBERS (*Plant Superintendent for Hickey*)

Came to work	7:00	R.303; AA.74
		R.304; AA.74
		R.317; AA.80
		R.351; AA
Signed measurement slip	8:00-8:15	R.323; AA.80
	8:00	R.324; AA
Told of trouble, went to dock to see scow	8:00	R.325; AA
	8:30	R.348; AA
Called dispatcher for Gallagher	8:00	R.305; AA.75
	8:00	R.326; AA.81
	8:30	R.349; AA
Called for tugs	8:00	R.322; AA
Scow capsized	9:30	R.341; AA.82

EMILIO SANNELLI (*Laborer for Hickey*)

Went aboard to measure *Triboro No. 12*	7:00-7:05	R.522; AA.112
Completed measuring *Triboro No. 12*	7:30	R.523; AA.113
	7:30	R.529; AA.113
Saw scow listing	8:00	R.527; AA
	8:30	R.527; AA

VINCENT CARPENTIERI (*Employee of Robert W. Hunt Co., Engineers*)

Sampled material aboard *Triboro No. 12*—saw it measuring going on	7:00	R.507, AA.110

Appendix.

(4)

W. GILMARTIN (*Foreman for Hickey*)

Occurrence	*Time*	*Page*
Arrived at Hickey plant	6:45-6:50	R.462; AA.102 R.474; AA.
Saw scows	6:45-6:50 7:05	R.462; AA.102 R.475; AA. R.476; AA.
Met Gallagher runner and protested to him	7:05	R.477; AA.
Went aboard *Triboro No. 12* to inspect list	7:45 "A little before 8:00"	R.464; AA.103 R.477; AA.108
Tried to move scow	8:20-8:30 8:00-8:15 8:30-8:	R.467-8; AA.105 R.486; AA.108 R.492; AA.
Scow capsized	9:20-9 9:30	R.467; AA.105 R.481; AA.

DEVEAU (*Scow Captain Tribero No. 12*)

Awakened in morning	7:00-7:30 7:30 6:30	R.68; AA.17 R.128; AA.33 R.195; AA.45
Saw two men measuring when he got up	—	R.77; AA.77
Checked scow for water	Close to 8:00	R.129; AA.34
Measuring still going on when he left	Close to 8:00	R.128; AA.33

From the above chart, it will be seen that Geddes, Hickey's crane operator, and the only person who could move the scows, testified that he arrived at the plant at 7:30 on January 25, 1956—not 7:00 o'clock as claimed in Gallagher's brief. It will be further seen that Chambers testified that the measurement slip was signed at 8:00 or 8:15 o'clock; that Torro and Sannelli (the Hickey laborers) testified that the measuring of the scow was not completed until 7:30 (completely inconsistent with a signing of the slip at 7:00 o'clock). It will be seen that Deveau, Triboro's scow captain, testified that he left the scow at "close to 8:00 o'clock" at which time the measuring was still going on. It will be seen that Geddes, Chambers and Gilmartin all agree that the *Triboro No. 12* was listing and in difficulty between 7:45 and 8:00 o'clock.

(5)

The merest reading of pages 527 and 528 of the Trial Minutes discloses that the statement made in Gallagher's brief as to Sannelli's testimony is completely inaccurate and that his testimony actually was to the effect that he saw the scow listing at about 8:00 or 8:30 and the crane attempted to move the scow at that time. Geddes (the crane operator) clearly testified that he attempted to move the *Triboro No. 12* by tugging on the other scows but was unable to since the *Triboro No. 12* was aground at the time he attempted to move it. This was between 8:00 and 8:30.

Actually, the only support for the contention that the measurement slip was signed at 7:00 o'clock rather than the later time posited by all of the other witnesses was the testimony of Nick Zappoli, the runner for Gallagher Brothers. Zappoli was able to testify clearly and positively that he arrived at 6:30 a.m. (R.395; AA.91) and completed measuring the scow at 7:00 a.m. (R.397; AA.91). He testified that he then filled out the measurement slip, proceeded to the Hickey office, waited for Chambers, had the slip signed and departed.

It seems odd indeed that this 82 year old (R.502; AA.93), retired Gallagher employee was able to rattle off these two key times so glibly in view of the fact that he testified he had made no statement concerning this case (R.402; AA.93); did not speak to any person about the case from January 1956 until approximately two weeks before the trial, when he spoke to a lawyer (R.402; AA.93); had not thought about the case in the interim between the happening and his interview with the lawyer (R.403; AA.94); was testifying solely from memory (R.403; AA.94); was not sure of the *Triboro's* position when he was aboard her (R.396; AA.); could not remember who had helped him to measure the scow (R.397; AA.); could not remember whether or not he saw the captain of the scow *Triboro No. 12* (R.403; AA.); was not sure how long he had to wait in Hickey's office for Chambers to arrive (R.404; AA.) and could not remember when he called the dispatcher in his office on that date (R.405; AA.94).

(6)

POINT II.

TRIBORO SCOW CORPORATION AND GALLAGHER BROTHERS SAND & GRAVEL CORPORATION ARE CLEARLY GUILTY OF NEGLIGENCE IN CONNECTION WITH THE DAMAGE TO THE *Triboro No. 12.*

The complete lack of refutation in either the brief of Triboro Scow Corporation or the brief of Gallagher Brothers Sand & Gravel Corporation of the imputations of fault and charges of negligence made against them by Hickey bears mute proof to the validity and force of those charges.

It is patent that neither Gallagher nor Triboro have sought to dispute Hickey's assertions of negligence solely because those assertions are indisputable.

Triboro's counsel, upon the argument of this appeal, weakly attempted to show that the scow was, on the morning of January 25, 1956, within the actual control of the appellant Hickey. The court was told that the facility used normally by Hickey to shift scows, viz., the crane mounted on caterpillar treads, only proceeded halfway down the Hickey bulkhead in an attempt to reach the *Triboro No. 12.* The inference which it was hoped the court would draw from this assertion was that, because of indifference or neglect, the crane operator had it within his power to take effective measures to rescue the *Triboro No. 12* but simply failed so to do.

Now that the photographs (Libellant's Exhibits 6 through 18) are in possession of the court, it may be seen that the reason why the crane operator could not proceed more than 90 feet from the southerly end of the Hickey dock is quite large, substantial and obvious. Clearly visible in the photographs, which were not available upon the argument of this appeal, is the large gravel pile which, according to the unrebutted testimony of Geddes, prevented the crane from proceeding to the uttermost tip of the Hickey bulk-

(7)

head. As has been asserted heretobefore, and not challenged by either of the appellees, the crane represented the sole means by which Hickey could have taken any action whatsoever to move the *Triboro No. 12*. The fact that the *Triboro No. 12* was placed in a position not abreast of the Hickey dock and beyond the effective control of Hickey is chargeable solely to Gallagher Brothers and to Triboro Scow Corporation. Hickey's berth was safe at the time the scow was brought in and remained safe throughout. The fact that the scow was not delivered to Hickey's berth impels a finding of fault with respect to the tug and the fact that the scow captain was grossly derelict in his duty impels a finding of fault with respect to his employer.

Respectfully submitted,

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Proctors for Respondent-Appellant,
M. F. Hickey Co., Inc.

GERALD J. MCKERNAN,
JAMES M. LEONARD,
of Counsel.

APPENDIX

New York Personal Property Law

"Sec. 100. Rules for ascertaining intention.

Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

2. When goods are delivered to the buyer on approval or on trial or on satisfaction, or other similar terms, the property therein passes to the buyer—

(a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction;

APPENDIX

New York Personal Property Law

"Sec. 129. What Constitutes Acceptance.

The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."

APPENDIX

Court of Appeals for the Second Circuit Rules

"RULE 15. Printing and Filing of Briefs and Appendices.

(a) Time of Filing; Printing. On all appeals or petitions for review to be fully heard by the court the appellant or petitioner shall file his brief and appendix within 30 days after the record is filed; the appellee or respondent shall file his brief, with appendix, if any, within 20 days thereafter; and if the appellant or petitioner then chooses to file a reply brief, he shall file it, with appendix, if any, within 15 days thereafter and at least one day before argument. Where an appendix is voluminous it may be bound separately from the brief which it accompanies. Except where permission has been given, the briefs and appendices shall be printed as provided in subdivision (f) of this rule and shall not be typewritten; but the court may dispense with printing on motion of a party or on its own motion at any time."

APPENDIX

Supreme Court Admiralty Rules

"RULE 46½. Findings of fact and conclusions of law.

In deciding cases of admiralty and maritime jurisdiction the court of first instance shall find the facts specially and state separately its conclusions of law thereon; and its findings and conclusions shall be entered of record and, if an appeal is taken from the decree, shall be included by the clerk in the record which is certified to the appellate court under rule 49."

APPENDIX

Federal Rules of Civil Procedure

RULE 52. Findings by the Court.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court sha... find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 579

TRIBORO SCOW CORPORATION, as owner of Scow "TRIBORO NO. 12",

Petitioner,

v.

M. F. HICKEY CO., INC.,

Respondent,

and

GALLAGHER BROTHERS SAND & GRAVEL CORPORATION and Tug "JOHN MURRAY",

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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December 30, 1960.

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IN THE

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OCTOBER TERM, 1960

TRIBORO SCOW CORPORATION, as owner of Scow "TRIBORO NO. 12", *Petitioner*, v. M. F. HICKEY CO., INC., *Respondent*, and GALLAGHER BROTHERS SAND & GRAVEL CORPORATION and Tug "JOHN MURRAY", *Respondent*.	No.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinion of the Court Below.

The opinion of the Court of Appeals for the Second Circuit is set forth in Petitioner's Appendix (pp. 18-23) and is reported at 280 F. 2d 308.

Jurisdiction.

Petitioner claims to invoke the jurisdiction of this Court under Title 28, U. S. C. Sec. 1254 (1).

The Question Presented.

Petitioner's question relates generally to the scope of review to be exercised by an appellate court with respect to a holding of negligence by an inferior court, sitting in admiralty. It further questions the propriety of the filing

and consideration of a reply brief subsequent to oral argument on an appeal.

Statement of Facts.

Petitioner devotes approximately eight and a half printed pages to a "Statement of Facts", which consists of a disparate conglomeration of selective quotations from the District Court's Findings of Fact, conclusory characterizations of testimony, argumentation and innuendo. Since the proper function of this brief is not a consideration of the merits of the cause, respondent, M. F. Hickey Co., Inc. will not, herein, advert in detail to those facts, ignored almost completely in petitioner's brief, which form the basis for the conclusions reached by the Court of Appeals. However, the attention of this Court is respectfully drawn to the opinion (Petition, p. 18) of the Court of Appeals.

ARGUMENT.

The first two divisions of petitioner's question.

The first two divisions of petitioner's question relate to the power, or lack thereof, of the Court of Appeals to reverse a decree in admiralty "without holding to be 'clearly erroneous' any specific finding of fact of the trial court."

It is asserted that the action of the Appellate tribunal was in contravention of the mandate laid down by this Court in its decision in *McAllister* v. *United States*, 348 U. S. 19 with respect to the scope of review available to a court of appeals.

It is significant that the petitioner does not see fit to set forth the clear standard enunciated by the *McAllister* decision.

> "A finding is clearly erroneous when 'although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed'

> United States v. Oregon State Medical Soc., 343 U. S. 326, 339, 96 L. Ed. 988, 72 S. Ct. 690; United States v. United States Gypsum Co., 333 U. S. 364, 395, 92 L. Ed. 746, 765, 68 S. Ct. 525" (*McAllister v. U. S.*, 348 U. S. 19, 20).

Apparently petitioner's contention is that the Appellate Court herein should have enumerated specific findings of fact made by the District Court and used, as words of art, the phraseology "We hold findings Nos. and to be clearly erroneous."

The District Court made, inter alia, the following findings:

> "23. Hickey's employees should have moved the *Triboro No. 12* to a safe berth between 7 a.m. and 8 a.m., instead of permitting her to remain in a place which they knew was dangerous."
>
> "24. The respondent, Hickey, failed to fulfill its duty to furnish a safe berth to the *Triboro No. 12* and failed to act with reasonable care with respect to her" (Petition, p. 37).

It is difficult to construe the language which the Court of Appeals used

> "Although there is a serious question as to whether there was proper delivery of the *Scow* in its precarious position, this issue need not be determined because the facts show that Hickey took such steps as were reasonable and feasible to try to remedy the situation presented to it by Gallagher and Triboro" (Petition, p. 23),

as anything but a clear rejection of Findings Nos. 23 and 24 made by the District Court.

Further, since the Court of Appeals concludes that

> "Here, however, both on the law and on the facts liability cannot be fairly imposed on Hickey" (Petition, p. 23).

the import of the Appellate Court's decision cannot be other than that Findings Nos. 23 and 24 of the District Court are "clearly erroneous".

The very decision upon which petitioner relies demonstrates that an Appellate Court is not required to employ, as if some ritual formula, the words "clearly erroneous" with respect to a specific finding. In the decision of the Court of Appeals for the Second Circuit in *McAllister* v. *United States* (207 F. 2d 952), the words "clearly erroneous" do not appear. The entire thrust of the holding by the Court of Appeals (in the *McAllister* case) was an attack on the "finding" that the libellant therein had contracted a disease as a result of claimed negligence on the part of that respondent.

> "Thus we cannot agree that evidence supports a finding made by the Court below that the libellant contracted polio as a direct result of the respondent's negligence" (*McAllister* v. *United States*, 207 F. 2d 952, 955).

A comparison of this language and of the scope of review exercised by the Second Circuit in the *McAllister* case and the language employed by that same court in the case now at bar and the scope of review exercised herein discloses but a difference in verbiage only.

This Court, however, specifically approved the *scope of review* exercised by the Second Circuit in the *McAllister* case, the reversal therein being posited on the erroneous conclusion drawn by the Court of Appeals.

> "We do not find that the Court of Appeals departed from this standard, although we do disagree with the result reached under the application of the standard" (U. S. at p. 20).

In attempting to imply that the Court of Appeals for the Second Circuit in the case at bar acted in derogation of the decision of this Court in *McAllister* v. *United States*

(cited supra), petitioner is drawing a distinction without a difference.

To demonstrate a conflict between the holdings of the Second Circuit and the various other circuits, particularly the 9th, petitioner quotes part of the opinion of the Court of Appeals for the 9th Circuit in *Pacific Tow Boat Co. v. States Marine Corp.*, 276 F. 2d 745. The portion of that opinion immediately following the passage quoted in petitioner's brief is illuminating.

> "It is true that any determination as to negligence requires the testing of facts against a predetermined standard of conduct. The fixing of that standard is a jural act. To this extent a question of law is involved, and hence a conclusion of law is required, in any determination as to negligence. Nothing said in McAllister or in any of our previous decisions was intended to limit the scope to review insofar as the fixing of the applicable standard of conduct is concerned" (276 F. 2d at p. 752).

The same Court said, in *Titus v. The Santarosa*, 258 F. 2d 352:

> "McAllister v. United States, 348 U. S. 19, 75 S. Ct. 6, 99 L. Ed. 20, laid to rest the right of appellate courts to try admiralty cases de novo, a prerogative which had been little used anyway in recent years.
>
> But still this court must examine the facts to determine if the ruling was clearly erroneous" (258 F. 2d at p. 353).

Thus, the 9th Circuit specifically recognizes the function of an appellate court in reviewing the entire evidence to determine whether or not a holding of negligence (be it labeled "finding of fact" or "conclusion of law") is clearly erroneous.

A careful reading of the decisions cited from various other circuits, claimed, by petitioner, to be in conflict with

the Second Circuit's position, discloses nothing but an adherence to the criteria laid down in the *McAllister* decision. None of these cases, in any way, conflicts with the action taken by the Court of Appeals in the case at bar.

That the Court of Appeals for the Second Circuit is not deficient in a full appreciation of the scope of its powers of review as delineated by the decision of this Court in the *McAllister* case may be seen from the following decisions, among many others:

Staples v. *Ace Builders Supply Co.*, 262 F. 2d 295;

N. Y., N. H. & H. R. R. Co. v. *Gray*, 240 F. 2d 460, cert. den., 353 U. S. 966, rehearing den., 354 U. S. 943;

Quintin v. *Sprague S. S. Co.*, 252 F. 2d 812;

Alison v. *United States*, 251 F. 2d 74;

Santamaria v. *S. S. Othem*, 272 F. 2d 280.

Petitioner's argument, granting to it, arguendo, the import most favorable to it, is self-defeating. In criticizing the Second Circuit's action in reversing the District Court's imposition of liability on Hickey petitioner avers that the Court of Appeals reversed on new "findings of fact". Assertedly, therefore, the Court of Appeals did not exercise its prerogative of correcting patent errors of law made by the District Court.

But in commending this case to the attention of this Court petitioner says:

> "At the same time the decision nullifies practices which have controlled and made orderly the dealings between vessel owners and consignees of cargo on vessels for many, many years and it has unsettled the law governing the rights and duties obtaining as between a vessel owner and the consignee of its cargo" (Petition, p. 16).

In other words, the Appellate Court erred because it dealt with "findings of facts"; but the case is of sufficient importance to warrant review by this Court because the 2nd Circuit applied a principle of law with which petitioner disagrees. Thus, petitioner unwittingly concedes that, in actuality, it is the *legal standard* applied by the Court of Appeals to the case at bar which the petitioner seeks to have this Court review.

The references to the New York Personal Property Law (Petition, p. 12) are completely inappropriate since the Court of Appeals found it unnecessary to decide whether or not there had been a proper delivery of the scow (Petition, p. 23).

The third division of petitioner's question.

The third division of petitioner's question implies that the Court of Appeals for the 2nd Circuit erred in granting to the respondent, M. F. Hickey Co., Inc., leave to file a brief replying to Gallagher Brothers Sand & Gravel Corporation fourteen (14) days subsequent to the oral argument on the appeal. The further contention is made that Hickey utilized this leave to prepare new material which was, in fact, Hickey's main brief disguised as a reply brief and the Court of Appeals compounded this conduct in considering this "reply brief" and in basing its decision on arguments and material contained therein.

Whether these contentions are worthy of consideration can be best judged from the following time schedule of the appellate proceedings:

Apr. 8, 1960—Hickey served and filed appellant's appendix and brief.

Apr. 28, 1960—Triboro's answering brief served and filed.

May 2, 1960—Hearing in Court of Appeals for the 2nd Circuit on Triboro's motion for a preference in respect to argument

on appeal (no opposition by Hickey or Gallagher). Motion granted.

May 10, 1960—Argument on appeal.

(Upon the argument of the appeal the proctor for Gallagher, whose time to file a brief in answer to appellant's brief had expired on April 28, 1960 [Rule 15 (a) of the Rules of the Court of Appeals for the 2nd Circuit providing that an answering brief must be filed within 20 days of receipt of appellant's brief] applied to the Court for leave to file a brief in answer to appellant's brief. Appellant asked the Court, should it grant Gallagher leave to file this tardy brief, to extend to appellant permission to file a brief in reply. Leave was granted. The Court also directed Triboro's counsel to file with the Court certain exhibits (photographs of the site of the accident) which Triboro's counsel had neglected to bring along to the argument.)

May 19, 1960—Gallagher served and filed its answering brief.

May 23, 1960—Hickey served and filed its reply brief.

Thus it will be seen that Hickey would have found it difficult to reply to Gallagher's answering brief prior to the return date of the argument when Gallagher's brief was not served upon Hickey until some nine days after argument and some twenty-one days after its time, according to the Rule, had expired.

As to petitioner's charge that the reply brief was, in fact, appellant's main brief and presented issues which petitioner had no chance to answer, the best demonstration of the invalidity of this contention is the following listing of the Points contained in appellant's original brief:

POINT I.

The tug *John Murray* was guilty of gross negligence in failing to insure that the *Triboro No. 12* was properly and securely moored.

(4 printed pages.)

POINT II.

The *Triboro No. 12* and her owner, the Triboro Scow Corporation, are chargeable with fault as a result of the negligence of the scow captain.

(5 printed pages.)

POINT III.

The Trial Court was in error in not holding that Hickey had fulfilled all of its legal duties toward the scow.

(7½ printed pages.)

Hickey exercised due care to furnish a safe berth to the *Triboro No. 12* and did, in fact, furnish such a berth.

There was never a proper delivery to the Hickey plant and accordingly Hickey did not owe any duties to the scow beyond the initial offering of a safe berth.

Hickey, even assuming that a delivery had been made, fulfilled the duty required of a consignee.

POINT IV.

The decision of the District Court is clearly erroneous in that, finding Hickey at fault, it did not order damages divided among *Triboro*, Gallagher and Hickey.

(3 printed pages.)

POINT V.

The libel of Triboro Scow Corporation against M. F. Hickey Co., Inc. should be dismissed as against Hickey, or in the alternative, the decision of the District Court should be modified as indicated in this brief.

The answering brief of Gallagher Brothers (when it finally appeared) contained the following points:

POINT I.

Hickey, as consignee, breached its duty of care.

POINT II.

Gallagher Brothers Sand & Gravel Corp., claimant of the tug *John Murray*, properly rested without proof.

A comparison of the points made in appellant's main brief with the issues passed upon by the opinion of the Court of Appeals for the 2nd Circuit discloses that the judges of that Court and petitioner were made fully aware of the nature and extent of appellant's contentions by the main brief.

Petitioner's arguments with respect to the reply brief are frivolous and entirely devoid of merit.

CONCLUSION.

The petition for a writ of certiorari should be denied in all respects since it is frivolous, does not raise any important issues of law, fails to demonstrate any conflict between the circuits and does not make a showing that the Court of Appeals erred in reversal of the decree of the Trial Judge herein.

Respectfully submitted,

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December 30, 1960.

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Office-Supreme Court, U.S.
FILED
JAN 16 1961
JAMES R. BROWNING, Clerk

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Petitioner,

vs.

M. F. HICKEY CO., INC.,

Respondent,

and

GALLAGHER BROTHERS SAND & GRAVEL CORPORATION and Tug JOHN MURRAY,

Respondent

PETITIONER'S REPLY

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Dated: New York, N. Y.
January 5th, 1961.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 579

TRIBORO SCOW CORPORATION, as owner of SCOW TRIBORO NO. 12,

Petitioner,

vs.

M. F. HICKEY CO., INC.,

Respondent,

and

GALLAGHER BROTHERS SAND & GRAVEL CORPORATION and TUG JOHN MURRAY,

Respondent.

PETITIONER'S REPLY

The respondent, Hickey, quotes from *Pacific Tow Boat Co.* v. *States Marine Corp.*, 276 F. (2d) 745 (9th Cir.), to the effect that:

> "It is true that any determination as to negligence requires the testing of facts against a predetermined standard of conduct. The fixing of that standard is a jural act. * * *"

In the instant case the applicable law was established, 1. by the New York Personal Property Law (45), and 2. by the Second Circuit's prior decisions in *New York Trap Rock Corp.* v. *Metropolitan No. 4*, 128 F. (2d) 831 and *The Eastchester*, 20 F. (2d) 357. They set the stand-

ard of conduct. The facts found by the District Court based on Hickey's admissions compelled application of these rules. The finding of the District Court that delivery had been made as of 7:00 A. M., the time recited in the receipt (10), that the scow was not observed to be in difficulty until 8:30 A. M. (14) and that respondent, Hickey, had more than an hour to move the scow to a safe place (15), since they are based on admissions of Hickey, witnesses could not properly be and they were not called "clearly erroneous" by the Court of Appeals.

Respondent, Hickey, says (p. 6) that the Second Circuit fully appreciated the scope of its powers as limited by *McAllister* v. *United States*, 348 U. S. 19, and cites *New York, New Haven & Hartford Railroad Co.* v. *Gray*, 240 F. (2d) 460 (2nd Cir.), in support of that proposition. In that decision, January 16th, 1957 (after the McAllister decision), the Second Circuit said at page 465:

> "A determination by a trial judge of the existence of negligence is not a finding of fact but a legal conclusion."

Thus we have another instance where the Second Circuit disagrees with *McAllister* v. *United States* as it later again did in *Verbeeck* v. *Black Diamond Steamship Corp.*, 269 F. (2d) 68 (Petition, p. 14).

The Court of Appeals, Second Circuit, said in *Barbarino* v. *Stanhope S.S. Co.*, 151 F. (2d) 553, at page 555.

> "It is true that in a jury trial the standard of care demanded in any given situation is regarded as a question of fact, and the verdict is as conclusive upon it as it is upon any other question; for a jury is deemed —rightly or wrongly—to be as well qualified to set a standard as a Judge. But when the decision is that of a Judge, we distinguish between such findings and true findings of fact; and the conclusion is as freely

reviewable as any 'conclusion of law', strictly so called."

We do not see how the question of negligence can be a fact question in one type of trial (jury) and a law question in another (non-jury). There can be no doubt, from the repeated statements by the Second Circuit on the subject, both before and after the McAllister case, that the Second Circuit insistently views the issue of negligence in a non-jury case, as a reviewable question of law. The instant case is a further demonstration of that view.

It seems anomalous that Counsel should be required to argue Admiralty appeals differently in New York from the way they argue them in Philadelphia or California. Admiralty always has insisted on uniformity throughout the country, *Workman* v. *Mayor*, 179 U. S. 552 at 561.

Respondent, Hickey, at page 8 of its brief herein creates the impression that it was at the oral argument in the Court of Appeals that it had requested permission to file a reply to Gallagher Brothers Sand & Gravel Corporation, the impleaded respondent, but we have a copy of a letter addressed to the Court by Counsel for Hickey dated May 13th, 1960, three days after argument, which reads:

"Upon the argument of the appeal in the above captioned matter counsel for Gallagher Brothers Sand & Gravel Corporation requested permission from this Court for leave to file an answering brief.

* * * *

Appellant respectfully requests that the Court grant to Appellant the same leave to file a reply brief, as provided by the rules of this Court, as Appellant would have had, had Appellees answering brief been timely served in accordance with the rules of this Court."

The Hickey unanswered "reply brief" a copy of which we have attached as an Appendix to our Petition, besides asking for a complete reappraisal of all of the testimony, contains in the caption of Point II (App. 43) the statement that Triboro Scow Corporation and Gallagher Brothers Sand & Gravel Corporation were guilty of negligence. The Court of Appeals adopted this view (App. 22). The Points contained in Gallagher's brief, which respondent Hickey prints at pages 9 and 10 of its answer herein, certainly did not call for Point II of respondent's "reply brief". The following passages in respondent's "reply brief" are to be noted:

Appendix 39:

> "These and other similar erroneous contentions were made by Gallagher's counsel (and indeed by Triboro's counsel) upon the oral argument of this appeal."

Appendix 43:

> "The complete lack of refutation in either the brief of Triboro Scow Corporation . . .
>
> . . .
>
> It is patent that neither Gallagher nor Triboro have sought to dispute Hickey's assertions
>
> . . . .
>
> Triboro's counsel, upon the argument of this appeal, weakly attempted to show that the scow was, on the morning of January 25, 1956, within the actual control of the appellant Hickey."

These statements were not a reply to Gallagher's brief, but were directly pointed at the petitioner after oral argument, when the petitioner could do nothing about them

under the Court of Appeals' rules. Thus respondent, Hickey, effectively sought and obtained after oral argument, a forbidden *Trial de novo*.

Respectfully submitted,

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80 Broad Street,
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Dated: New York, N. Y., January 5th, 1961.

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